

Powerpoint

Brand New Instructions

⦿ **107 Instructions Considered as a Whole**

You are to consider all of **my** preliminary and final instructions together. **Do not** single out any individual sentence, point, or instruction and ignore the others.

⦿ **701 Damages – Guess or Speculation**

Base your decision on the evidence and not on guess or speculation. **However**, damages need not be proven to a mathematical certainty.

⦿ **1143 Respondeat Superior – Vicarious Liability**

An employer is liable for the negligent act of its employee done within the scope of [his][her] employment.

[However, even if the employee is acting within the scope of (his)(her) employment, an employer is not liable for the negligent act of its employee where the act is done on the employee's own initiative and is not done in the service of the employer.]

◎ 1923 Licensee – Elements and Burden of Proof

To recover damages from [*defendant*], [*plaintiff*] must [prove][have proven] each of the following by the greater weight of the evidence:

- (1) [*defendant*] was the [owner][occupant] of property;
- (2) [*plaintiff*] was a licensee on the property [owned][occupied] by [*defendant*];
- (3) [*plaintiff*] was injured as a result of a condition on the property; and
- (4) [*defendant*]:
 - (a) willfully or intentionally injured the licensee, or acted in a manner to increase the licensee's risk of injury, or
 - (b) knew of a hidden danger on the property and did not warn the licensee of that danger.

◎ 3139 Assault – Elements

To recover damages caused by assault, [*plaintiff*] must prove by the greater weight of the evidence that:

- (1) [*defendant*] acted with the intent to cause:
 - (a) harmful or offensive contact with [*plaintiff*][a third person], or
 - (b) [*plaintiff*]'s fear that the contact is about to occur, and
- (2) [*defendant*]'s act caused [*plaintiff*] to reasonably fear that the contact was about to occur.

Old v. New Instructions

Direct and Circumstantial Evidence

© OLD 4.02 Direct Evidence – Circumstantial Evidence – Inference

Direct evidence means evidence that directly proves a fact, without an **inference**, and which, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which an **inference** of the existence of another fact may be drawn.

An **inference** is a **deduction** of fact that may logically and reasonably be drawn from another fact or group of facts.

It is not necessary that facts be proved by direct evidence. You may consider both direct evidence and circumstantial evidence as proof.

© NEW 305 Direct Evidence & Circumstantial Evidence

The parties in this case may prove a fact by one of two types of evidence—direct evidence or circumstantial evidence.

Direct evidence is direct proof of a fact.

Circumstantial evidence is **indirect** proof of a fact.

For **example**, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal's tracks in the snow.

It is not necessary that any fact be proved by direct evidence. You may consider both direct evidence and circumstantial evidence as proof.

Preponderance

© OLD 1.05 Burden of Proof - Preponderance of the Evidence

When a party has the burden to prove an issue by a **preponderance** of the evidence, **that means by a greater weight of the evidence**. A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side is not necessarily of the greater weight. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more probably true than not true.

© NEW 509 Greater Weight of the Evidence (Preponderance of the Evidence)

Evidence is of the **greater weight** if it convinces you most strongly of its truthfulness. **In other words**, it is evidence that convinces you that a fact is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

Mitigation

© OLD 6.13 Duty to Mitigate - Fault

The plaintiff must use reasonable care to minimize [his][her] damages. This is called **mitigation** of damages.

If you find the plaintiff failed to use reasonable care to minimize any of the damages [he][she] **alleges** [he][she] has **sustained** and that failure was a **proximate** cause of any of the damages [he][she] claims, then such conduct would **constitute** fault to be **assessed** against the plaintiff.

The defendant has the burden of proving by a **preponderance** of the evidence that the plaintiff failed to use reasonable care to minimize [his][her] damages.

© NEW 935 Duty to Minimize (Mitigate) Post-Injury in Comparative Fault Cases

A plaintiff must use reasonable care to **minimize** [his][her] damages after [he][she] is [injured][harmed].

[*Plaintiff*] may not recover for any item of damage that [he][she] could have avoided through the use of reasonable care.

[*Defendant*] has the burden of proving by the **greater weight** of the evidence that [*plaintiff*] failed to use reasonable care to minimize [his][her] damages.

You should not consider failure to minimize damages as fault. Rather you may consider failure to minimize damages to reduce the amount of damages that [*plaintiff*] claims.

Proximate Cause

© OLD 5.06 Proximate Cause - Definition

An act or omission is **a proximate** cause of an injury if the injury is a natural and probable consequence of the act or omission.

© NEW 301 Responsible Cause (Proximate Cause)—Definition

A person's conduct is **legally responsible** for causing an injury if:

- (1) the injury would not have occurred without the conduct, and
- (2) the injury was a natural, probable, and foreseeable result of the conduct.

This is called a “**responsible cause**.”

Nuncupative Will

◎ OLD 27.17 Requirements of Due Execution - Nuncupative Will

In order to have a valid **nuncupative** will, the following requirements must be met:

A person may make a **nuncupative** will disposing of part of his property when:

- (1) The person is in imminent peril of death, whether from illness or otherwise; and
- (2) The person dies as a result of the impending peril.

In addition, the will must be:

- (3) Declared by the person as his will before two disinterested witnesses;
- (4) Written down, by or under the direction of one of the witnesses, within thirty days after the declaration; and
- (5) Submitted for **probate** within six months after the death of the person making the will.

◎ NEW 3917 Requirements of Due Execution—Nuncupative (Oral) Will

You must decide whether the **oral** will made by Mr. Goodman shortly before his death is a valid will.

Mr. Goodman's oral will is a valid will if:

- (1) Mr. Goodman was in imminent peril of death;
- (2) Mr. Goodman died as a result of that peril;
- (3) Mr. Goodman stated, before two disinterested witnesses, that the gift of property he wished to make was his will at that time;
- (4) one of the witnesses wrote down, or directed someone else to write down, Mr. Goodman's statement within thirty days after Mr. Goodman made it; and
- (5) the written statement was **submitted to the Court** within six months after Mr. Goodman died.

Res Ipsa Loquitur

© OLD 9.13 Res Ipsa Loquitur

A doctrine called ***res ipsa loquitur*** may apply under certain conditions in a negligence case. For this doctrine to apply, the plaintiff must prove by a **preponderance** of the evidence the following:

- (1) The plaintiff was injured [damaged] as a **proximate** result of [*here set out the occurrence, e.g., the falling chandelier*];
- (2) The [*here set out the instrumentality, e.g., chandelier*] was **under the exclusive control** of the defendant [defendant's agent]; and
- (3) The [*here set out the occurrence, e.g., falling of the chandelier*] usually would not happen unless the defendant [defendant's agent] was negligent. If all of these elements have been proved, then you may infer the defendant was negligent and you may consider this inference with all of the other evidence in the case in arriving at your verdict.

© NEW 325 Res Ipsa Loquitur

There are certain situations in which the nature of an incident and the circumstances surrounding it lead to the reasonable belief that it would not have occurred unless someone did not use reasonable care.

If [*plaintiff*] proves all of the following by the **greater weight** of the evidence:

- (1) [*plaintiff*] was [injured][harmed][damaged] [as a result of][when] [*here insert event which was a responsible cause of injury/damage/harm*];
- (2) **only** the [*defendant*][*defendant's agent*] controlled [*insert name of instrumentality*]; and
- (3) under normal circumstances the [event][*insert event*] would not have occurred unless the [*defendant*][*defendant's agent*] was negligent, then you may infer that the incident resulted from [*defendant*]'s negligence. You may consider this inference with all of the other evidence in arriving at your verdict.

Joint Duty of Health Care Providers

© OLD 23.02 Joint Duty of Health Care Providers

When two or more [health care providers] **owe the same duty** to a patient, and each contributes to the same breach of that duty, they are **individually and jointly liable** for the patient's [death] [injury].

© NEW 1519 Joint Duty of Health Care Providers Qualified Under the Medical Malpractice Act

If you decide that [*name of health care providers*] were both **medically negligent**, and that their negligence contributed to the same injury, they are **both liable for the entire amount** of [*plaintiff*]'s damages.

Attractive Nuisance

© OLD 25.13 Attractive Nuisance – Injury to Trespassing Children

When children trespass, **the law recognizes that** they may be **incapable of understanding** and appreciating all of the possible dangers that they may encounter when trespassing.

The [owner] [occupant] of property **owes** trespassing children **a duty** of reasonable or ordinary care to protect them from some hidden dangers on the property to which they may be attracted.

© NEW 1933 Attractive Nuisance

Children may not understand or appreciate the dangers they may encounter when trespassing.

[Owners][Occupants] of property must **use** ordinary and reasonable care to protect trespassing children from hidden dangers to which children may be attracted on their property.

Expert Witness

© 4.01 Expert Witness-Hypothetical Question

Generally, a witness may not express an opinion. However, one who follows a profession or special line of work is permitted to express an opinion because of the knowledge, skill, experience, training, or education of the witness. The purpose of such testimony is to help you in arriving at a just verdict.

[The attorneys have asked questions in which the expert witness was to assume that certain facts were true and to give an opinion based upon such assumptions. You must decide whether the assumed facts, upon which the expert based the opinion, are true. If you decide any assumed fact is not true, then you should decide what effect, if any, that has on the expert's opinion.]

You should judge the testimony of the expert witness in the same manner as you judge the testimony of any other witness. In deciding its weight, you may also take into consideration the expert's skill, experience, knowledge, **veracity**, familiarity with the facts of this case, and the general rules for deciding the credibility of witnesses.

© 307 [Opinion][Expert][Skilled] Witness

Generally, a witness may not express an opinion. However, one who follows a profession or special line of work may express an opinion because of [his][her] knowledge, skill, experience, training, or education.

Judge opinion testimony in the same manner that you judge other testimony. In deciding how much weight to give opinion testimony, you may also take into consideration:

- (1)** the witness's skill, experience, knowledge, and familiarity with the facts of this case;
- (2) the reliability of the information supporting the witness's opinions;** and
- (3)** the reasons for the opinions.

Collateral Source Evidence

© OLD 11.07 Collateral Source Evidence

If you find that plaintiff is entitled to recover, you shall **consider** evidence of payment made by some **collateral source** to compensate the plaintiff for damages resulting from the occurrence in question.

In determining the amount of plaintiff's damages, you shall consider the following types of collateral source payments: worker's compensation.

In determining the amount received by Mr. Doe from collateral sources, you shall consider any amount Mr. Doe is required to repay to a collateral source and the cost to the plaintiff of collateral benefits received.

© NEW 531 Collateral Source Evidence

You have heard evidence of worker's compensation benefits Mr. Doe received and whether Mr. Doe must repay those benefits.

Any amount Mr. Doe must repay for those benefits will be paid out of any verdict you award to Mr. Doe after this trial is over. Do not reduce your verdict by the amount of those benefits Mr. Doe must repay.

[Any amount Mr. Doe is not required to repay will not be paid out of any verdict you award to Mr. Doe after this trial is over. In determining your verdict, therefore, reduce what you would otherwise award Mr. Doe by the amount of any benefits Mr. Doe is not required to repay.]

Assumption of Risk

© OLD 5.43 Assumption of Risk - Employer - Employee - Ordinary and Extraordinary Risks in General

An employee assumes all risks **ordinarily incident to the discharge of her duties, arising from** known defects or dangers. Determining whether the plaintiff has assumed the risk of injury requires a **subjective analysis** focusing upon:

1. The plaintiff's **actual knowledge** and appreciation of the specific risk, and
2. The plaintiff's voluntary acceptance of that risk.

© NEW 1127 Incurred Risk/Assumed Risk—Common Law Negligence Only

Mr. Smith claims **Ms. Jones** knew of a specific danger, understood the risk she faced, and voluntarily exposed herself to the danger. **In other words**, Mr. Smith claims Ms. Jones voluntarily assumed the risk.

To prove Ms. Jones assumed the risk, Mr. Smith must prove by the greater weight of the evidence that:

- (1) Ms. Jones **knew** and appreciated the specific risk; and
- (2) Ms. Jones voluntarily accepted the risk.

If you decide that Ms. Jones assumed the risk, your verdict should be for Mr. Smith.